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TORTS

LAWRENCE C. MANN†

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INTRODUCTION

Areas of particular significance during the *Survey* period include products liability and governmental immunity. In the area of products liability, the Michigan Supreme Court declined to determine whether a manufacturer of birth control pills has a duty to warn the ultimate user, stating that this determination is best left to the legislature. The court's reluctance to rule in the area of products liability for drugs sharply contrasted with its willingness to abolish implied warranty as a theory of liability for design defects. In the area of governmental immunity, the supreme court restructured the governmental immunity doctrine to shield state and local governmental agencies from tort liability, subject to narrow exceptions.

Given limitations of space and time, this Article will discuss only those cases with an impact on black letter law. Cases con-

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cerning procedure, evidence, or pleading practices, as well as those involving the Workers' Disability Compensation Act, are beyond the scope of this Article.

I. PRODUCTS LIABILITY

A products liability case involving a forklift truck allowed the Michigan Supreme Court to make substantial changes in the common law.¹ In *Prentis v. Yale Manufacturing Co.*,² plaintiff sustained a hip injury while operating a stand-up forklift truck.³ Plaintiff had difficulty starting the battery powered forklift on prior occasions as the battery charge wore down. Power surges strong enough to throw a person off balance would occur once the forklift started and previously had caused the forklift to break through a garage door.⁴ Although plaintiff was aware that the battery charge was low, he attempted to start the forklift while it was on a slight incline. Plaintiff was working the operating handle up and down when the forklift had a power surge, causing him to lose his balance and fall to the ground.⁵ Plaintiff alleged negligence and breach of implied warranty in the design of the forklift and negligent failure to warn of dangers associated with its use. At trial, plaintiff focused mainly upon his design defect claim.⁶

The principal ground for plaintiff's appeal was the trial court's failure to give separate jury instructions. The trial court had merged the negligence and implied warranty claims and charged the jury with a unified jury instruction requested by defendant.⁷ The stand-

1. For an earlier case making substantial changes in the products area, see *Owens v. Allis-Chalmers, Corp.*, 414 Mich. 413, 326 N.W.2d 372 (1982). *Owens* is a restatement of Michigan law rather than a new doctrinal development. It was the supreme court's first attempt to specify the relationship between a design defect claim and plaintiff's proof of an alternative design by requiring that the alternative design be feasible and practicable.

2. 421 Mich. 670, 365 N.W.2d 176 (1985).

3. *Id.* at 676, 365 N.W.2d at 178. Powered industrial trucks can be loosely divided into trucks designed to be controlled by a riding operator and trucks designed to be controlled by a walking operator. See F.E. McELROY, ACCIDENT PREVENTION MANUAL FOR INDUSTRIAL OPERATIONS (8th ed. 1980). The truck that Prentis used was of the latter classification.

4. 421 Mich. at 676, 365 N.W.2d at 178.

5. *Id.*

6. The thrust of defendant's design claim was that the forklift should have included a seat or platform for the operator. *Id.* at 678, 365 N.W.2d at 179. This alternative design would have involved a substantial modification likely affecting the forklift's utility. Curiously, plaintiff did not proffer a narrower alternative such as a limit switch, which would have prevented the forklift from operating when the battery drain reached a fixed level.

7. The trial judge instructed the jury as follows:

ard implied warranty jury instruction requires that a jury determine whether a product is fit for its intended or reasonably foreseeable purposes.⁸ The trial court rejected the use of this instruction based on the argument that the Michigan products liability statute⁹ merges negligence and implied warranty theories of recovery.

The court of appeals reversed the trial court's decision not to administer the implied warranty standard jury instruction because of established precedent requiring that standard jury instructions be given whenever applicable.¹⁰ The supreme court reversed, holding that in a products liability action based upon allegations of defective design, the jury need only be instructed on a single unified theory of negligent design.¹¹

The supreme court's abandonment of the implied warranty standard jury instruction, in use for more than a decade, is not surprising. Several of its recent decisions foreshadowed *Prentis*.

1) Defendant's duties and liabilities as a manufacturer:

A manufacturer of a product made under a plan or design which makes it dangerous for uses for which it is manufactured is . . . subject to liability to others whom he should expect to use the product or to be endangered by its probable use from physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

A manufacturer has a duty to use reasonable care in designing his product and guard it against a foreseeable and unreasonable risk of injury and this may even include misuse which might reasonably be anticipated.

2) Negligent conduct of both plaintiff and defendant: Now when I use the word "negligence" with respect to the Defendant's conduct, I mean the failure to do something which a reasonably careful person would do or the doing of something which a reasonably careful person would not do under the circumstances which you find existed in this case. It is for you to decide what a reasonably careful person would do or not do under the circumstances.

When I use the words "ordinary care," I mean the care a reasonably careful person would use under the circumstances which you find existed in this case. The law does not say what a reasonably careful person would do or not do under such circumstances. That is for you to decide.

Now it was the duty of the plaintiff in connection with this occurrence to use reasonable care for his own safety, and it was the duty of the Defendant in connection with this occurrence to use ordinary care for the safety of Plaintiff.

Id. at 679-80, 365 N.W.2d at 180.

8. MICH. STAND JURY INSTR. 2D § 25.22 (1980).

9. MICH. COMP. LAWS ANN. §§ 600.2945-.2950 (West Supp. 1985).

10. *Prentis v. Yale Mfg. Co.*, 116 Mich. App. 466, 470, 323 N.W.2d 444, 446 (1982).

11. Although it endorsed a negligence instruction, the court did not premise its decision on the products liability statute. 421 Mich. at 692, 365 N.W.2d at 186.

For example, in *Smith v. E.R. Squibb & Sons*,¹² the court eliminated the implied warranty jury charge in failure to warn cases, holding that a reasonableness standard controlled.¹³ Then, in *Owens v. Allis-Chalmers Corp.*,¹⁴ the court invoked a risk/utility balancing approach in determining that plaintiff had not presented sufficient proof to withstand defendant's directed verdict motion.¹⁵ Since the court adopted a negligence approach in design cases involving failure to warn claims and a risk/utility balancing approach in other design cases, its pronouncement in *Prentis* was predictable. Despite increasing support for this approach in design defect litigation, much of the court's reasoning is amenable to criticism.

The court gave numerous reasons for its decision to use a fault system. These reasons included greater deterrence, cheaper insurance rates for the careful, much needed protection against the risk posed to a manufacturer's assets, avoidance of juror confusion inherent in administering both a negligence and a warranty jury charge, and a fair burden of proof for plaintiff because, unlike manufacturing defects, design defects result from deliberate decisions which are documentable and therefore discoverable. Much of the data accumulated over the past decade, however, directly contradicts or, at a minimum, fails to support the court's reasoning.

In regard to its incentive/deterrence contention, the court stated that to the extent that products liability is intended to reduce the likelihood of injury by encouraging the design of safe products: "[A] negligence standard that would reward the careful manufacturer and penalize the careless is more likely to achieve that purpose. . . . The incentive will result from the knowledge that a distinction is made between those who are careful and those who are not."¹⁶

12. 405 Mich. 79, 273 N.W.2d 476 (1979). In *Smith*, the court directly addressed the relationship of negligence to an implied warranty jury instruction for the first time. Justice Levin, in dissent, impliedly endorsed a "consumer expectations" approach. Justice Levin's dissent in *Smith* must be read in conjunction with his dissent in *Prentis*. See *infra* note 30 and accompanying text.

13. 405 Mich. at 90-91, 273 N.W.2d at 480.

14. 414 Mich. 413, 326 N.W.2d 372 (1982).

15. In *Owens*, the court affirmed a directed verdict because plaintiff had failed to present a prima facie case of negligence or a defect. Regarding plaintiff's proposed alternative design, the court stated: "[W]e cannot take judicial notice that their use by forklift drivers would be likely, practical, or more safe. Neither the costs nor the effects of the other restraints were established." *Id.* at 431, 326 N.W.2d at 379. The court thus employed a risk/utility analysis in deciding whether a prima facie case in negligence or implied warranty had been presented. *Id.* at 432, 326 N.W.2d at 379.

16. 421 Mich. at 689-90, 365 N.W.2d at 379.

The assumption that the reward for the careful designer is reduced insurance premiums¹⁷ is unsubstantiated. The most authoritative federal agency report to date¹⁸ found no correlation between efforts by manufacturers to ensure safety and differences in the cost of insurance coverage.¹⁹ Indeed, the report found that the drastic across-the-board increases in premiums experienced in the mid-1970s probably reflect an overreaction to increased product liability claims and judgments.²⁰ The report stated:

Product liability insurance rates and premiums should be monitored to ensure that they are fair, nondiscriminatory and reasonably related to product risk.

.....

Since insurance regulation is currently undertaken only at a state level, it is essential that the state regulators have access to a data base which includes nationwide experience on all product liability claims. Regulators need such a data base in order to evaluate rate requests effectively.

*There is a need to promote greater financial disclosure and accountability in product liability insurance.*²¹

Thus, there is not enough data at this time to articulate any relationship between insurance rates and care in designing products. The rates may vary as a result of product type, manufacturer size, subjective insurer perception, and a myriad of other factors. It is unlikely that the insurance industry, as a result of a negligence standard, is able to determine which manufacturers are designing safe products.

The *Prentis* court also focused on a principal difference between manufacturing defect cases and design defect cases. In design defect cases, a manufacturer's entire product line is at risk, thereby endangering a greater portion of the manufacturer's assets and potentially depriving the consumer of a needed product.²² Noting

17. *Id.*

18. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PROD. LIAB., FINAL REPORT 273-320 (1978), reprinted in 44 Fed. Reg. 62,714 (1979).

19. The report stated: "Thus we are unable to make any generalized observation as to whether insurers provide that a manufacturer's product liability premium will be diminished by the insured's application of a product liability prevention plan." *Id.* at 178. Given past insurance company behavior in Michigan, the insurers would likely retain the enhanced profits from reduced claims or merely slow the rate of increase in premiums.

20. *Id.* at V-47-49.

21. *Id.* at V-49 (emphasis added).

22. 421 Mich. at 690, 365 N.W.2d at 185.

these risks, the court required that plaintiff satisfy a higher threshold of fault.²³ The court, however, failed to consider whether an entire product line, and hence the assets of a manufacturer, ought to be put at risk because of a defective design. As Justice Levin stated in dissent, "To the extent that the argument incorporates the result of a lower fault standard in terms of fewer successful products liability actions, the argument begs the question whether there should be a lower standard."²⁴

Moreover, in raising the risk posed to manufacturers' assets as a criterion, the court may have presumed that too many manufacturing enterprises have failed or been threatened with failure because of the implied warranty approach in design defect cases. The court's failure to state this point may result from the lack of statistical support for such a conclusion.²⁵ Although the risk to a manufacturer's assets is insurable, legal standards governing manufacturer liability should not be determined by the availability of insurance, but instead await evidence as to the scope of the problem.

Juror confusion best supports the change adopted in *Prentis*. In affirming the trial judge's refusal to instruct on breach of warranty, the Michigan Supreme Court concluded that the in-

23. *Id.* The *Prentis* court adopted the Model Uniform Product Liability Act, which applies a negligence or fault standard to design defect claims. The court offered four reasons to support this application: (1) unlike manufacturing defects, design defects result from deliberate decisions that are discoverable through modern discovery rules; (2) a negligence standard for design defect claims will reward the careful manufacturer and penalize the careless; (3) a higher threshold of fault is required because a finding for plaintiff is equivalent to a determination that the entire product line is defective; (4) a standard based on fault is intrinsically fairer to manufacturers who are careful in their production and design. *Id.* at 689-90, 365 N.W.2d at 185.

24. *Id.* at 702 n.19, 365 N.W.2d at 191 n.19 (Levin, J., dissenting).

25.

Product Introduction and Discontinuation.

Product liability problems in the pharmaceutical and other high-risk product lines may reinforce trends against new product development with the result that some socially beneficial products may never be developed or may be discontinued. This is especially true for smaller firms. On the other hand, some of the products that are not produced (or or discontinued) may be ones whose potential for causing harm outweighs their social utility. This is an area that deserves further investigation.

Business Failures

Product liability problems do not appear to have been a direct and sole cause of business failures.

U.S. DEP'T OF JUSTICE, CONSUMER PROD. SAFETY COMM'N, INTERAGENCY TASK FORCE ON PROD. LIAB., FINAL REPORT (1976) [hereinafter cited as FINAL REPORT].

struction "could have created juror confusion and prejudicial error. Indeed, such an instruction would have been repetitive and unnecessary and could have misled the jury into believing that plaintiff could recover on the warranty count even if it found there was no 'defect' in the design of the product."²⁶

The court's conclusion that juror confusion results from administering both negligence and implied warranty instructions presents a dilemma. In actions involving a nonmanufacturer seller or a claim of manufacturing defect, the implied warranty instruction remains valid. Thus, the net effect of the court's decision is to eliminate juror confusion in a narrow class of cases, while promoting it in all cases involving nonmanufacturer sellers or manufacturing defect claims.²⁷

The issue in *Prentis* was whether a jury can focus on manufacturer design choices without necessarily adjudicating manufacturer or designer negligence. Justice Levin, contrary to the majority, felt that a jury could.

In a vigorous dissent, Justice Levin indicated that the issue is not resolved simply by finding that some juror confusion may result from separate instructions on manufacturer negligence and product fitness.²⁸ He found that resolution of this issue involved questions ranging from insurance company rate-making practices to profound questions concerning the quality of life in modern industrial society. According to Justice Levin, these questions should not be decided solely upon juror confusion. Nevertheless, Justice Levin reached too far in urging a perpetuation of the "reasonable fitness" standard. The former implied warranty instruction, which asked the jury to determine if a products design was "reasonably fit," required the jury to compare the safety of the design with some external standard. The standard jury instruction, however, did not supply this external standard. It left this important yardstick to the proofs at trial and the closing arguments of counsel.

Absent some generally accepted standard or example of what is reasonably fit, the concept of "reasonable fitness" is outside the ken of the average attorney, let alone the average juror. Nothing in our culture and experience provides common, universally accepted examples of "reasonable fitness." Thus, without additional language focusing the jury solely upon the product at issue and away from the issue of designer fault, the inquiry is reduced to a consideration of fault. That inquiry is even more likely when negligence claims are joined with implied warranty counts and

26. 421 Mich. at 691-92, 365 N.W.2d at 186.

27. *Id.* at 679, 692, 365 N.W.2d at 180, 186.

28. *Id.* at 697, 365 N.W.2d at 188 (Levin, J., dissenting).

sophisticated defense counsel employ current strategies. Simply put, the issue becomes whether the designer negligently made specific design choices as measured by the factual circumstances of a plaintiff's accident and injury.

The former implied warranty instruction failed to focus juror attention upon the alleged product flaw and away from considerations of designer negligence. Nor did it focus upon designer negligence.²⁹ Thus, individual jury verdicts might be explained by the sophistication and tactics of trial counsel. Although that explanation applies to most jury verdicts, it especially applies to the former implied warranty instruction. Other jurisdictions have not solved the problems associated with design defect claims. Some jurisdictions, to avoid consideration of designer culpability, have adopted a "consumer expectations" approach, asking whether the performance of the product met ordinary consumer expectations. This approach is not a panacea and appears no more advantageous than the former Michigan standard of reasonable fitness.³⁰

Neither the consumer expectations standard nor the reasonable fitness test adequately captures the fundamental social policy question underneath all products design claims. This question is whether society desires that the product on trial be in a different form, given the alternative designs available at the time of manufacture and their feasibility, utility, and accident potential. Analytically, whether an individual designer was negligent is not relevant to this inquiry. Thus, the court's adoption of a negligence standard represents a greater diversion from this core question than the reasonable fitness and consumer expectations approaches.

Despite the foregoing discussion, the impact of the *Prentis* court's adoption of a negligence standard on design defect claims will be negligible for several reasons. First, *Owens v. Allis-Chalmers Corp.*³¹ already requires quasi-negligence proofs in design cases.

29. The Michigan Supreme Court, in adopting the implied warranty theory in products liability actions, rejected RESTATEMENT 2D § 402A and notions of strict liability because the court feared that "strict liability" might be confused with absolute liability or liability without fault. Thus, implied warranty jury instruction has its genesis in the court's failure to clearly adopt either a strict liability or negligence approach in design defect litigation.

30. See Keeton, *Products Liability-Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 293 (1979). Under a consumer expectations approach: (1) A plaintiff could never recover for an open and obvious hazard; (2) Non-defective products could be found defective; and (3) The premise "underlying the test falsely assumes that the ordinary purchaser has definite expectations about the dangerousness of the product." *Id.* at 302-03.

31. 414 Mich. 413, 326 N.W.2d 372 (1982). See *supra* notes 14-15 and accompanying text.

In addition, most astute plaintiffs' counsel will pursue design cases as negligence actions given the nebulous nature of the reasonable fitness standard and the benefit of proving that defendant is a wrongdoer. As a result of *Prentis*, it is not clear what, if anything, the consumer has lost; it is also not clear how the product reliability and safety areas will be impacted.

The relationship between product liability litigation and specific design decisions is tenuous. A recently completed study sponsored by the Rand Institute For Civil Justice concluded that there is little connection between the two.³² This is a result of the long time period between a specific design decision and the final adjudication of the product liability claim,³³ the inconsistencies of juries, and the rapid changes that occur in judicial doctrine in this area.³⁴

It is not evident what message *Prentis* sends to designers of products. The instruction *Prentis* endorsed requires that a manufacturer or designer merely behave reasonably with respect to design decisions and does not require that the manufacturer or designer be a design expert. A negligence instruction should be added that would put designers on notice that the designs of products placed in commerce must reflect significant investments in technology and product safety.

Additional Michigan Supreme Court decisions in the products liability area during the *Survey* period deserve discussion. In these cases,³⁵ the court declined to decide when and under what circumstances the manufacturer of a prescription drug, used in a nontherapeutic manner, owes a duty to warn the ultimate user of the side effects and hazards posed by use of the drug.

In *Odgers v. Ortho Pharmaceutical Corp.*,³⁶ plaintiff alleged partial paralysis resulting from her use of an oral contraceptive.

32. G. EADS & P. REUTER, DESIGNING SAFER PRODUCTS, CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION vii-viii (Rand Institute for Civil Justice, R-3022-ICJ (1983)).

33. *Id.* at vii (estimating a lapse of 5 or more years).

34. *Id.*

35. *In re Certified Questions: Odgers v. Ortho Pharmaceutical Corp.; Grainger v. Sandoz Pharmaceuticals*, 419 Mich. 686, 358 N.W.2d 893 (1984). *Grainger* and *Odgers* were filed in the United States District Court for the Eastern District of Michigan.

36. 419 Mich. 696, 358 N.W.2d 873 (1984). *Odgers* sought damages for injuries resulting from plaintiff's nontherapeutic use of an oral contraceptive that her physician prescribed. After the trial court granted defendants' motion for a new trial on the ground of jury instruction error, the court certified the duty to warn question to the Michigan Supreme Court. 609 F. Supp. 867, 868 (E.D. Mich. 1985).

In the companion case of *Grainger v. Sandozf Pharmaceuticals*,³⁷ plaintiffs alleged that Mellaril, a drug commonly used in the treatment of various affective disorders such as schizophrenia, caused decedent's death. In declining to answer the certified question posed by *Odgers*, the court, limited by the language in *Smith v. E.R. Squibb & Sons, Inc.*,³⁸ stated that the dictum in *Squibb* did not establish "whether a manufacturer's duty is to provide . . . warnings to the prescribing physician or directly to the patient."³⁹ The court concluded that the legislature is better equipped to answer a public policy question that involved marketing and economics in a major industry.⁴⁰ The dissent⁴¹ recognized the need for a duty to warn the ultimate user of oral contraceptives but not of other prescription drugs.⁴² This issue is not fully resolved and may soon be reconsidered.⁴³

Thus far, a substantial majority of state courts adhere to the "learned intermediary doctrine" and do not except oral contraceptives.⁴⁴ Some recent decisions, however, support an exception to this doctrine for mass-marketed prescription drugs that entail minimal physician supervision, substantial consumer selection, and nontherapeutic usage.⁴⁵

In *Michigan Mutual Insurance Co. v. Heatilator Fireplace*,⁴⁶ the supreme court overturned the trial court's grant of summary

37. In *Grainger*, plaintiff sought damages for a heart attack allegedly resulting from use of the therapeutic drug Mellaril. Plaintiff alleged that defendant manufacturer had a duty to warn. The trial judge struck this allegation, but then certified the duty to warn issue to the Michigan Supreme Court. *Id.*

38. 405 Mich. 79, 273 N.W.2d 476 (1979).

39. 419 Mich. at 697, 358 N.W.2d at 877.

40. *Id.* at 691-92, 358 N.W.2d at 874.

41. Justice Boyle wrote the dissenting opinion, joined by Chief Justice Williams and Justice Brickley.

42. 419 Mich. at 718, 358 N.W.2d at 887 (Boyle, J., dissenting).

43. Justice Riley did not take office until 1985 and took no part in the opinion. Notably, at least one federal court has decided the issue, concluding that the manufacturer has a duty to warn the consumer or user of birth control pills. Recently, in *Stephens v. G.D. Searle & Co.*, 602 F. Supp. 379 (E.D. Mich. 1985), Judge Gilmore adopted the argument articulated by the *Odgers* dissent, but stated:

The fact that a majority of the Supreme Court of Michigan declined to decide this question does not prevent this Court from fulfilling its responsibility to rule on the issue. It would have been much better if a majority of the Supreme Court had answered what is essentially a common law question. *Such questions are universally addressed to courts.*

Id. at 381 (emphasis added).

44. See *Odgers*, 419 Mich. at 704-05, 358 N.W.2d at 881.

45. E.g., *MacDonald v. Ortho Pharmaceutical Co.*, 394 Mass. 131, 475 N.E.2d 65 (1985).

46. 422 Mich. 148, 366 N.W.2d 202 (1985).

judgment, holding that there was a question of fact whether the manufacturer had a duty to warn about the dangers of obstructing the vents of a prefabricated sheet metal fireplace.⁴⁷ The court noted that this duty exists regardless of the purchaser's knowledge.⁴⁸

In *Piper Aircraft Corp. v. Dumon*,⁴⁹ the court found that plaintiff should receive contribution for payments in excess of its pro rata share of a judgment.⁵⁰ The court held that the relevant statute⁵¹ does not require that a claimant for contribution be a joint tortfeasor.⁵²

In *White v. Chrysler Corp.*,⁵³ plaintiffs sustained injuries while manufacturing component parts.⁵⁴ The prime contractor provided specifications that each component manufacturer of die was required to follow. The prime contractor retained title to the die.⁵⁵ The supreme court applied the negligent entrustment theory, emphasizing that there was no actual entrustment of the die by the prime contractors to their component parts suppliers.⁵⁶

As a practical matter, *White* signals the end of negligent entrustment actions in an industrial context. In the future, automobile and industrial manufacturers will routinely require that the component part supplier provide the tooling necessary to complete the contract.

This contractual nuance, however, is too artificial to support the *White* decision since defendants in that case actually specified the design of, and maintained title to, the die. The contract price undoubtedly encompassed the cost of the die. By controlling the design specifications and contract price, the prime contractor may dictate whether the press die will use a system designed to prevent injury arising from press operations. The court focused on limiting the potential expansion of product manufacturer liability.⁵⁷

47. *Id.* at 153, 366 N.W.2d at 205.

48. *Id.* at 154, 366 N.W.2d at 205.

49. 421 Mich. 445, 364 N.W.2d 647 (1985).

50. *Id.* at 455, 364 N.W.2d at 654.

51. MICH. COMP. LAWS ANN. § 600.2925(c) (West Supp. 1985).

52. 421 Mich. at 445, 364 N.W.2d at 653.

53. 421 Mich. 192, 364 N.W.2d 619 (1984).

54. *Cf. Fredericks v. General Motors Corp.*, 411 Mich. 712, 311 N.W.2d 725 (1981).

55. 421 Mich. at 197-98, 364 N.W.2d at 621.

56. *Id.* at 201, 364 N.W.2d at 623. Unlike *Fredericks*, defendants in *White* did not supply the die. Rather, the contracts required that the component part manufacturer supply the die necessary for the production of the parts. Therefore, it is arguable that a negligent entrustment claim under *Fredericks* is still viable.

57. The court indicated that imposing liability would transform the responsibility for job safety, putting it on the employer of the component parts contractor. 421 Mich. at 204, 364 N.W.2d at 624.

In *White*, plaintiff's attempt to impose job safety responsibilities upon the prime contractor reflected a crisis in the work place⁵⁸ that the court acknowledged.⁵⁹ Thus, the court denied relief because of the magnitude and scope of the problems of uncompensated loss for industrial injuries.⁶⁰

In *Przeradski v. Rexnord, Inc.*,⁶¹ the court of appeals upheld a jury instruction⁶² that precluded a finding of negligence absent a latent defect or insufficient conformity with industrial or governmental design standards.⁶³ The court concluded that the result would not differ if it applied *Owens* retroactively.⁶⁴

The *Przeradski* majority ignored the supreme court's direct rejection in *Owens* of the substance of this instruction as a misstatement of Michigan common law.⁶⁵ As the dissent noted, "[T]he Court of Appeals decision in *Owens* put forward a new analysis

58. Data indicate that as much as 50% of the total insurance payouts involve workplace accidents and that approximately 30% of those payments involved *employer negligence*. FINAL REPORT, *supra* note 25, at 41-45.

59. The court stated:

The larger problem of uncompensated loss for industrial injury or disease remains unresolved, and a solution may be impeded, by allowing a finite number of seriously injured workers to recover for loss not covered by workers' compensation benefits. This social problem deserves a broader solution than patchwork by this Court.

421 Mich. at 206, 364 N.W.2d at 625.

60. *Id.*

61. 136 Mich. App. 349, 356 N.W.2d 634 (1985).

62. The trial court relied on *Owens v. Allis-Chalmers Corp.*, 83 Mich. App. 74, 268 N.W.2d 291 (1978), *rev'd*, 414 Mich. 413 (1982). The supreme court subsequently reversed *Owens*, but released its opinion after the court of appeals decided *Przeradski*. *Przeradski* was then remanded to the court of appeals for reconsideration in light of the new supreme court decision. 417 Mich. 1100.19, 338 N.W.2d 188 (1983).

63. The jury instruction read:

When I use the word "negligence" with respect to the defendant's conduct, you will find that I will be referring to negligent design. And in that respect I mean, one, that the design claimed to be negligent was not in conformity with industry design standards or design guidelines established by an authoritative voluntary association; or two, the design choice of the manufacturer carries with it a latent or hidden risk of injury, and the manufacturer has not adequately communicated the nature of that risk to potential users of the product. It is for you to decide whether the design of the machine in this case was negligent under such circumstances. But, that is the definition of the term, negligent design, that I will be using subsequently.

136 Mich. App. at 362, 356 N.W.2d at 639 (Maher, J., dissenting).

64. The court stated, "Viewing the instructions as a whole, we doubt that the differences engendered by the Supreme Court decision in *Owens* would cause a different result." *Id.* at 361, 356 N.W.2d at 639.

65. *Id.* at 363, 356 N.W.2d at 640.

for product liability litigation; prior decisions of the Court of Appeals had followed the generally accepted theory eventually adopted by the Supreme Court in its decision in *Owens*.⁶⁶

In *Schmitzer v. Misener-Bennett*⁶⁷ and *DeGraaf v. General Motors Corp.*,⁶⁸ the trial courts rejected evidence of seatbelt nonuse in auto negligence and crashworthiness cases. After holding that there was no common law duty to use ordinary care in buckling seat belts, the court of appeals concluded that the legislature is better equipped to decide whether motorists should be required to use seat belts.⁶⁹

DeGraaf also addressed whether evidence of a lack of seat belt use is admissible on the issue of proximate cause. The trial court charged the jury that if plaintiff's failure to wear a seat belt was the sole proximate cause of her enhanced injuries, the jury should find for defendant.⁷⁰ Although nonuse as comparative negligence is distinct from considerations of proximate cause, the *DeGraaf* court correctly reasoned that the trial court's instruction actually imposed a duty to use a seat belt. The court predicated the decision, as in *Schmitzer*, on *Romankewiz v. Black*.⁷¹

In 1985, Michigan joined the few other states⁷² that have enacted statutes requiring seat belt use.⁷³ The statute provides that failure to use seat belts may be considered evidence of negligence and may also reduce recovery for damages by not more than five percent.⁷⁴

II. GOVERNMENTAL IMMUNITY

The *Survey* period contained several important decisions regarding governmental immunity.⁷⁵ In *Ross v. Consumers Power*

66. *Id.*

67. 135 Mich. App. 350, 354 N.W.2d 336 (1984), *leave to appeal denied*, 422 Mich. 852 (1985).

68. 135 Mich. App. 141, 352 N.W.2d 719 (1984), *leave to appeal denied*, 422 Mich. 852 (1985).

69. *Id.* at 145, 352 N.W.2d at 721.

70. *Id.* at 142, 352 N.W.2d at 720.

71. 16 Mich. App. 119, 167 N.W.2d 606 (1969) (plaintiff's failure to use seat belt not breach of duty).

72. See Note, *The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME LAW. 272, 277-78 n.24 (1980); see also Casenote, *Whether They Know It or Not, Florida Motorists Must "Buckle Up" or Risk Loss of Full Recovery: Insurance Co. of North America v. Pasakarnis*, 12 FLA. ST. U.L. REV. 669 (1984).

73. MICH. COMP. LAWS ANN. §§ 257.710e(1)-(8) (West 1985).

74. *Id.* § 257.710e(5).

75. Court of appeals decisions concerning governmental immunity have been excluded from this Article. *E.g.*, *Sanford v. City of Detroit*, 143 Mich.

Co.,⁷⁶ the Michigan Supreme Court attempted to clarify the doctrine of governmental immunity. The result substantially restricts government liability in tort.

Ross fashions major changes in the governmental immunity doctrine.⁷⁷ Ross continues the supreme court's practice of accumulating a substantial number of cases and using them to pronounce substantial departures from prior doctrine.⁷⁸ The Ross court held:⁷⁹

(a) that state and local governments are immune from tort liability for governmental functions

(b) that governmental function is defined as "any activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law;"

(c) that state and local governments may not be found vicariously liable unless an employee, within the scope of his employment, "commits a tort while engaged in an activity which is non-governmental or proprietary, or which falls within a statutory exception;"⁸¹

(d) that judges, legislators and the highest level executives, when acting within the scope of their respective capacities, are absolutely immune; and

App. 194 (1985) (plaintiff assaulted in abandoned building owned by city sufficiently pled intentional nuisance to avoid governmental immunity) (application for leave to appeal pending). *Sanford* is discussed later in this Article, however, for its treatment of a premises liability issue. See *infra* notes 175-78 and accompanying text.

76. 420 Mich. 567, 363 N.W.2d 641 (1984).

77. The Michigan Supreme Court has used three different tests to determine whether an act was a "governmental function." 1) An act for the "common good of all" without a profit motive was considered a governmental function. *Gunther v. Cheboygan County Rd. Comm'n*, 225 Mich. 619, 621, 196 N.W. 386, 387-88 (1923). 2) An act with no common analogy in the private sector had the "essence of governing" and, therefore, was a governmental function. *Thomas v. Dep't of State Highways*, 398 Mich. 1, 21, 247 N.W.2d 530, 538 (1976) (Kavanagh, C.J., and Fitzgerald, J., dissenting). 3) An activity whose purpose, planning and creation could only be effectively accomplished by the government also lay in the essence of government and, therefore, was a governmental function. *Parker v. Highland Park*, 404 Mich. 183, 200, 273 N.W.2d 413, 419 (1978) (Moody, J., concurring) (municipally owned general hospital not immune); *Perry v. Kalamazoo State Hosp.*, 404 Mich. 205, 214, 273 N.W.2d 421, 424 (1978) (Moody, J., concurring) (public mental hospital immune).

78. The adoption of this method reflects either the difficulty in the application of precedent or the change in the membership of the supreme court. The death of Justice Moody is significant because he provided the swing vote in both *Parker* and *Perry*.

79. Justice Levin dissented. Justice Kavanagh did not participate.

80. 420 Mich. at 591, 363 N.W.2d at 647.

81. *Id.* at 592, 363 N.W.2d at 647.

(e) that lower level officers and employees enjoy a qualified immunity, contingent upon their good faith and whether the act was discretionary-decisional as opposed to ministerial-operational.⁸²

The court's conclusion that state and local governments are immune from tort liability for acts or commissions arising from their performance of "governmental functions" is not novel. That term has consistently limited the immunity that the applicable statutory provision affords.⁸³ The court's definition of governmental function as "any activity which is expressly or impliedly mandated" by law is inconsistent with its prior formulations.⁸⁴

The breadth of this new definition cannot be overemphasized, for it renders every act of state and local government immune from tort liability unless a statutory exception,⁸⁵ contract theory,⁸⁶ or nuisance theory⁸⁷ provides for liability. Recognizing that its new governmental immunity doctrine might not reflect a proper balance of policy considerations, the court noted that its "definition may be statutorily modified to reflect more accurately the desires and needs of the public."⁸⁸

The *Ross* court found governmental immunity in eight of the nine consolidated cases.⁸⁹ These findings illustrate the many governmental activities for which a constitutional, statutory or other

82. The court analyzed the evolution of the doctrine of governmental immunity. While a complete discussion of the court's historical analysis is beyond the scope of this Article, it should be noted that some of the court's conclusions are questionable. For example, the court states that the legislature intended to treat the state and lower governmental divisions uniformly. *Id.* at 614, 363 N.W.2d at 658. Yet, as Justice Levin noted in his dissent, judicial construction, not legislative action, transformed sovereign immunity into governmental immunity applicable to both state and municipal governments. *Id.* at 671-72 n.23, 363 N.W.2d at 685-86 n.23.

83. MICH. COMP. LAWS ANN. § 691.1407 (West Supp. 1985). The first sentence of the statute expressly affords immunity only where a governmental function is involved:

[A]ll governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. . . . this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed.

Id.

84. 420 Mich. at 591, 363 N.W.2d at 647.

85. MICH. COMP. LAWS ANN. §§ 691.1402, .1405, .1406, .1413 (West 1968 & Supp. 1985).

86. See *Rocco v. Department of Mental Health*, 114 Mich. App. 124, 319 N.W.2d 674 (1979); *infra* note 89.

87. *Rosario v. City of Lansing*, 403 Mich. 124, 268 N.W.2d 230 (1978).

88. 420 Mich. at 620-21, 363 N.W.2d at 661.

89. In *Ross v. Consumers Power Co.*, the court held a drainage district

legal mandate can be implied or, if necessary, devised.⁹⁰ If the constitution, a statute, or other law provides general authority for an activity, and that activity furthers the general authority, then the government is shielded from tort liability. The court has attempted to avoid making judicial "value judgments" in cases involving immunity.⁹¹ However, the *Ross* court's approach is premised on the assumption that state and lower level units of government will not err in making these judgments.

That the legislature intended to completely shield lower level government from liability in tort is unsettled. Justice Levin noted that the legislature did not intend to completely shield lower level government. This interpretation would render unnecessary the limitation on immunity for a governmental agency to activities related to the exercise or discharge of a governmental function.⁹²

The legislature apparently adopted the governmental tort liability act's assumption that the state and its agencies enjoy complete sovereign immunity from tort liability.⁹³ If such immunity had not been complete, the legislature would not have waived the state's immunity for proprietary functions.⁹⁴ Furthermore, section 7 of the Act, which affirms the immunity of the state as it existed under common law, becomes superfluous by the court's conclusion

to be immune on the basis of MICH. COMP. LAWS ANN. §§ 280.1-.630 (West 1979). *Id.* at 637-38, 363 N.W.2d at 669. In *Willis v. State*, the court found the state immune on the basis of the Social Welfare and the Youth Rehabilitation Services Acts. *Id.* at 641, 363 N.W.2d at 671. In *Siener v. State*, the Mental Health Code provided the basis for the state's immunity. *Id.* at 643, 363 N.W.2d at 672. In *Regulski v. Murphy*, the School Code provided the basis for the school district's immunity. *Id.* at 649-50, 363 N.W.2d at 675. In *Trezzi v. City of Detroit* and *Zavala v. Zinser*, the Michigan Constitution, the city charter, and MICH. COMP. LAWS ANN. § 117.3(j) (West 1967) provided the basis for immunity. *Id.* at 653-54, 363 N.W.2d at 677. In *Disappearing Lakes Ass'n v. State*, the state was immune on the basis of the Michigan Constitution and MICH. COMP. LAWS ANN. §§ 281.951-.965 (West 1979). *Id.* at 656-57, 363 N.W.2d at 678.

90. As Justice Levin stated, a governmental entity may "expand the scope of its own immunity by promulgating an ordinance or other law relating to its activities." 420 Mich. at 684, 363 N.W.2d at 692 (Levin, J., dissenting).

91. *Id.* at 617, 363 N.W.2d at 660. One problem with the former interpretation of "governmental function" was that it required extensive review by both the supreme court and the court of appeals. The approach in *Ross* is likely borne, at least in part, of the judicial frustration and the misallocation of judicial resources the former definition of "governmental function" fostered. *Id.*

92. *Id.* at 664-70, 363 N.W.2d at 682-85 (Levin, J., dissenting).

93. See Cooperrider, *The Court, The Legislature, and Governmental Tort Liability in Michigan*, 72 MICH. L. REV. 187, 277 (1973).

94. MICH. COMP. LAWS ANN. § 691.1413 (West Supp. 1985).

that the first sentence of that statutory provision applies with equal force to both the state and lower level government agencies.⁹⁵

Justice Levin, therefore, would provide complete immunity for state government, subject to statutory exceptions, but define "governmental function" to provide less than a complete shield for lower level government agencies.⁹⁶ The chief obstacle to Justice Levin's argument is the title of the Act, which indicates that the legislature intended to make state and lower level governmental agencies uniformly immune.

Both the majority and the dissent in *Ross* are persuasive. Because of competing statutory constructions of relatively equal weight, governmental immunity requires legislative intervention.

A. Vicarious Liability

The court also precluded vicarious tort liability for governmental agencies by incorporating the definition of "governmental function" into the standard for vicarious liability.⁹⁷ Thus, if the activity the governmental employee engaged in was in furtherance of a "governmental function," the governmental agency is immune.⁹⁸

This approach to vicarious liability may signal the demise of significant case law.⁹⁹ Prior to *Ross*, a trilogy of cases, *Lockaby*

95. 420 Mich. at 665-67, 363 N.W.2d at 682-83. The core of governmental immunity in Michigan is embodied in MICH. COMP. LAWS ANN. § 691.1407 (West Supp. 1985). See *supra* note 6. The second portion of the provision unequivocally affords the state immunity "as it existed heretofore." MICH. COMP. LAWS ANN. § 691.1407. If the legislature believed that the immunity afforded lower level government was coextensive with that of the state, there would have been no reason to include this language because the first sentence of the statute extends immunity to *all* governmental agencies for conduct in the discharge of a "governmental function." Thus, the court's conclusion that the legislature intended the state and lower level governmental units be treated the same renders the second sentence superfluous.

96. 420 Mich. at 663, 363 N.W.2d at 681.

97. *Id.* at 625, 363 N.W.2d at 663-64.

98. The court stated:

[I]f the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (i.e., the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to § 7 of the governmental immunity act.

Id.

99. The court also cited with approval *Hirych v. State Fair Comm'n*, 376 Mich. 384, 136 N.W.2d 910 (1968), and *Sherbutte v. City of Marine City*, 374 Mich. 48, 130 N.W.2d 920 (1964). *Sherbutte* involved allegations of excessive

v. *Wayne County*,¹⁰⁰ *Galli v. Kirkeby*,¹⁰¹ and *McCann v. Michigan*,¹⁰² carved an exception to governmental immunity for intentional torts. In *Lockaby*, the Michigan Supreme Court found that allegations of an intentional tort by Wayne County avoided governmental immunity.¹⁰³ Similarly, the court in *Galli* held that allegations of homosexual assault by a school principal were sufficient to overcome a defense to governmental immunity.¹⁰⁴ Finally, the court in *McCann* reversed summary judgment in favor of the government because plaintiff alleged an intentional tort.¹⁰⁵

Lockaby cannot be reconciled with the court's new approach to governmental functions. Under *Ross*, if governmental employees are engaged in activities that the constitution, statute, or other law directly or impliedly mandates, the government is immune.¹⁰⁶ For example, the tortious conduct in *Lockaby* occurred during the course of a statutorily mandated employment function.¹⁰⁷ Since maintaining the county jail and controlling its residents is authorized by law, a literal reading of *Ross* would shield the county from liability for its employees' intentional torts. However, this line of reasoning is suspect because the court did not expressly overrule *Lockaby*, *McCann*, and *Galli*. Indeed, the court cited those cases as examples of vicarious liability, without reference to any limitation resulting from the court's new definition of governmental function. Moreover, since none of the nine cases before the court involved the intentional tort exception, trial courts should not assume that *Lockaby* has no force.

force by a police officer while making an arrest. Construing 1951 Mich. Pub. Acts No. 59, the court stated, "The political subdivision was not liable for the tort of the police officer on the theory of *respondeat superior*, because the agency doctrine related a tortious act to it, for which it could not be compelled to respond because of its governmental immunity." 374 Mich. at 50, 130 N.W.2d at 921. *Hirych* involved allegations of assault and battery, false arrest, malicious prosecution and claims in assumpsit. In finding the City of Detroit immune, the court stated: "As for the City of Detroit, its police activity was in the exercise of a governmental function. Under *Williams v. City of Detroit*, 364 Mich. 231, governmental immunity exists, as to any such acts of a city prior to September 22, 1961." 376 Mich. at 393, 136 N.W.2d at 913-14.

100. 406 Mich. 65, 276 N.W.2d 1 (1979).

101. 398 Mich. 527, 248 N.W.2d 149 (1976).

102. 398 Mich. 65, 247 N.W.2d 521 (1976).

103. 406 Mich. at 77, 276 N.W.2d at 5.

104. 398 Mich. at 537-38, 248 N.W.2d at 152-53.

105. 398 Mich. at 81, 247 N.W.2d at 525.

106. See *supra* notes 76-96 and accompanying text.

107. The state police arrested Lockaby and took him to the Wayne County Jail, where he was evaluated as "mental." While in a cell for such inmates, Lockaby knocked himself unconscious by hitting his head against the wall. The injuries resulted in Lockaby becoming a quadriplegic. 406 Mich. at 74, 276 N.W.2d at 2.

B. Individual Immunity

Prior to *Ross*, the supreme court had blurred the boundaries of individual immunity, either by confusing it with notions of governmental function¹⁰⁸ or by providing overbroad immunity through an ultra vires approach.¹⁰⁹ The court's establishment of absolute immunity for judges, legislators, and high level executive officers comports with the decisions of numerous other jurisdictions.¹¹⁰ Although the meaning of "highest level executive officials" remains unclear, cases from other jurisdictions help interpret this standard.

Problems arise, however, regarding lower level governmental employees and officials. According to the court, a *qualified tort immunity* exists for these individuals with respect to the following sections: "(1) acting during the course of their employment and acting, or reasonably believe they are acting, within the scope of their authority; (2) acting in good faith; and (3) performing discretionary, as opposed to ministerial acts."¹¹¹ The key is distinguishing between discretionary and ministerial acts. *Ross* attempts to clarify the issue by focusing upon whether the acts complained of involve matters of "operation" or "decision." The court explained that "discretionary" denotes a decisional aspect and "ministerial" denotes an operational aspect.¹¹² The court's decisions in three of the consolidated cases involving public officers or employees¹¹³ illustrate the problems inherent in this approach.

In *Willis v. Nienow*,¹¹⁴ the court held that decisions of a juvenile care facility staff determining which children would participate in a swimming outing, as well as staff hiring decisions, were "discretionary-decisional acts entitled to immunity."¹¹⁵ In *Regulski v. Murphy*,¹¹⁶ the court held that offering a vocational class, allowing

108. See *Bush v. Oscoda Area Schools*, 405 Mich. 716, 275 N.W.2d 268 (1979).

109. See *Lockaby*, 406 Mich. 65, 276 N.W.2d 1. For a criticism of both this case and *Bush*, see *Ross*, 420 Mich. at 629-32, 363 N.W.2d at 665-67. See also Littlejohn & DeMars, *Governmental Immunity After Parker and Perry: The King Can Do Some Wrong*, 1982 DET. C.L. REV. 1, 39-41.

110. 420 Mich. at 633-34, 363 N.W.2d at 667.

111. *Id.* at 633, 363 N.W.2d at 667-68.

112. *Id.* at 633-34, 363 N.W.2d at 667-68.

113. Of the nine cases consolidated in *Ross*, three specifically dealt with public officers or employees. The court of appeals decisions appear as follows: *Zavala v. Zinser*, 123 Mich. App. 352, 333 N.W.2d 278 (1983); *Regulski v. Murphy*, 119 Mich. App. 418, 326 N.W.2d 528 (1982); *Willis v. Nienow*, 113 Mich. App. 30, 317 N.W.2d 273 (1982).

114. 420 Mich. 567, 363 N.W.2d 641 (1984).

115. *Id.* at 639-40, 363 N.W.2d at 670-71.

116. *Id.* at 567, 363 N.W.2d at 641.

plaintiff to participate, or "deciding where and when to conduct the class" were discretionary functions.¹¹⁷ However, the court stated that instruction and supervision were ministerial.¹¹⁸ The court also distinguished the setting of safety policies within a school, which is discretionary, from failing to comply with them, which is ministerial: "The actual provision of eye protective devices, first aid supplies, and emergency transportation involves only ministerial-operational acts."¹¹⁹ In *Zavala v. Zinser*,¹²⁰ the court held that a police officer's determination of the appropriate response to unlawful conduct was discretionary, but the execution of the response was ministerial.¹²¹

The court's decisions in *Regulski* and *Zavala* vividly depict the unworkable balance that the court struck in the area of individual immunity. The distinction between decisional and operational acts has neither eliminated the problem of judicial "value judgments" nor brought clarity to the individual immunity doctrine. In effect, the court has made the value judgment that decisions regarding curriculum development and class size in schools and decisions to use force during police intervention are of a different genus than decisions regarding the supervision and teaching of a class or in executing an arrest. This distinction is impracticable and requires endless court interpretation of the semantic distinctions.

Except in the most obvious cases,¹²² the discretionary-decisional/ministerial-operational dichotomy does not help preserve the freedom of public servants to perform their job, unfettered by fear of tort liability. The discretionary-ministerial distinction makes it difficult for public employees to determine when and under what

117. *Id.* at 651, 363 N.W.2d at 675-76.

118. *Id.*

119. *Id.* at 651, 363 N.W.2d at 676.

120. 420 Mich. 567, 363 N.W.2d 641.

121. *Id.* at 659-60, 363 N.W.2d at 679-80. The court stated:

The determination of what type of action to take, *e.g.*, make an immediate arrest, pursue a suspect, issue a warning, await backup assistance, etc., is a discretionary-decisional act entitled to immunity. Once that decision has been made, however, the execution thereof must be performed in a proper manner, *e.g.*, the arrest must be made without excessive force, the pursuit of the suspect must not be done negligently, the request for assistance must include reasonably accurate information, etc.

Id.

122. See *Bandfield v. Wood*, 421 Mich. 774, 364 N.W.2d 280(1985). *Bandfield* involved allegations of breach of government regulations regarding certain procedural requirements. Where there are specific regulations that obviously delimit the exercise of discretion and a clear violation of it, the discretionary/ministerial test may be applied with ease.

circumstances they are likely to be immune from tort claims. As a result, courts must decide individual tort immunity on a case-by-case basis.

Unlike governmental immunity, individual immunity is neither directed nor limited by legislative command.¹²³ It is curious that the court has adopted a standard which invites litigation. Perhaps the court attempted to mitigate the harshness of the "governmental function" definition by ensuring that injured plaintiffs will be able to maintain negligence actions against employees who are not engaged in discretionary activity. If so, *Ross* inappropriately inverts the liability chain by making individual employees the most likely litigation targets for injured plaintiffs. Thus, whether to defend a tort action or to compensate an injury is now largely a matter of governmental discretion. Although *Ross* has been widely criticized, the regressive nature of Michigan's Governmental Immunity Act¹²⁴ must be kept in mind. The Act is out of step with the modern view of governmental immunity.¹²⁵ Thus, the options available to the court in *Ross* were limited. A legislative reformulation of the immunity doctrine is the only effective way to accomplish significant change in this area.

The supreme court also decided several immunity cases involving apparent statutory conflicts. In *Bakun v. Sanilac County Road Commission*,¹²⁶ the court held that defendant road commission could be held liable for the negligent operation of a motor vehicle pursuant to the governmental immunity statute.¹²⁷ The court reached this conclusion despite statutory language that places liability for construction and maintenance of trunk line highways solely on the state.¹²⁸

In *Sziber v. Stout*,¹²⁹ the supreme court considered whether the statutory exception to governmental immunity for defective

123. 420 Mich. at 628-29, 363 N.W.2d at 665.

124. MICH. COMP. LAWS ANN. §§ 691.1401-.1415 (West 1968 & Supp. 1985).

125. The current trend is toward the abrogation of immunity. See Littlejohn & Kotch, *Torts*, 1977 *Ann. Survey of Mich. Law*, 24 WAYNE L. REV. 655, 657-58 (1978). To date, only 14 states have a state immunity doctrine. The states which retain full immunity for states include: Arkansas, Maryland, South Dakota, Virginia, and Wyoming. Georgia, Kansas, New Hampshire, North Dakota, and Oklahoma allow a waiver in the case of insurance. Connecticut, Kentucky, Michigan, Tennessee, North Carolina, South Carolina, Texas, and West Virginia have retained partial immunity.

126. 419 Mich. 202, 351 N.W.2d 810 (1984).

127. MICH. COMP. LAWS ANN. § 691.1405 (West 1968).

128. *Id.* § 250.61 (West 1967). This section provides that counties and cities be divested of responsibility and liability for injuries resulting from trunk line highway construction and maintenance. *Id.*

129. 419 Mich. 514, 358 N.W.2d 330 (1984).

roads¹³⁰ allowed the joinder of a governmental agency as a third party defendant under the contribution statute.¹³¹ The court held that the third-party plaintiffs had a cause of action for contribution, unfettered by governmental immunity.¹³² The court then considered whether the two year statute of limitations barred the claim.¹³³ The contribution statute requires that a claim be filed "within 6 months after discharge by such party of the common liability or payment of more than his pro rata share."¹³⁴ Had the two year statute of limitations period been applied, the contribution claim would have been extinguished before it could accrue under the contribution statute. The court rejected this statutory construction, stating that "[w]e cannot suppose that the Legislature intended such an absurd result."¹³⁵

III. DEFAMATION

During the *Survey* period, the Michigan Supreme Court perpetuated the confusing distinction in defamation cases between exemplary and compensatory damages for injury to feelings. *Peisner v. Detroit Free Press, Inc.*¹³⁶ involved the interpretation of portions of the Michigan statute governing damages in libel actions.¹³⁷ The jury rendered a verdict of \$52,000 against both the reporter, who was responsible for the defamatory newspaper article, and the Detroit Free Press. The jury also awarded additional damages of \$100,000 against the Free Press. Defendant attacked the award as a double recovery, claiming that it guaranteed plaintiff recovery for emotional injury under the statute governing actual damages and under the statute governing exemplary and punitive damages.¹³⁸

130. MICH. COMP. LAWS ANN. § 691.1402 (West 1968).

131. *Id.* § 600.2925 (West 1968).

132. 419 Mich. at 528-29, 358 N.W.2d at 336.

133. MICH. COMP. LAWS ANN. § 691.1411(2) (West 1968).

134. *Id.* § 600.2925(4).

135. 419 Mich. at 538, 358 N.W.2d at 340 (footnote omitted).

136. 421 Mich. 125, 364 N.W.2d 600 (1984).

137. MICH. COMP. LAWS ANN. § 600.2911 (West 1968). The statute provides for the recovery of actual damages including damages for injury to feelings for any statement proven to be defamatory. *Id.* § 600.2911(2)(c).

"Exemplary and punitive damages" have consistently been limited to damages for injury to feelings and have not included punishment of defendant. Historically, "exemplary" and "punitive" have been used interchangeably to mean damages for the increased emotional injury presumed to flow from the ill will behind the publication of a defamatory statement. 421 Mich. at 134-35, 364 N.W.2d at 605. A clear explanation of this point can be found in *Ross v. Leggett*, 61 Mich. 445, 453, 28 N.W. 695, 698-99 (1886).

138. *Peisner v. Detroit Free Press, Inc.*, 104 Mich. App. 59, 304 N.W.2d 814 (1981), *modified and aff'd*, 421 Mich. 125, 364 N.W.2d 600 (1984).

The court of appeals reversed and remanded for a new trial on the damage issue.¹³⁹ The supreme court rejected the double recovery characterization, but agreed that the case should be remanded for a new trial, ruling that plaintiff would have to show "common law malice" to sustain an award of exemplary and punitive damages under the libel statute.¹⁴⁰

Thus, in Michigan, a plaintiff in a libel action may recover two types of damages for injury to feelings. The first type is compensatory damages based upon the actual injury to feelings. The second type is exemplary and punitive damages associated with the additional bad feelings resulting from defendant's ill will in publishing the defamatory statement. The court explained that this scheme is appropriate because defendant's "malicious motive" increases the victim's outrage.¹⁴¹ Thus, "[i]f a man employs spite and venom in administering a physical hurt he must not expect his maliciousness to escape consideration when he is cast to make compensation for his wrong."¹⁴²

Although faithful to the canons of statutory construction,¹⁴³ *Peisner* illustrates that even sound principles, when taken to extreme lengths, may confound logic and yield impractical results. The trial judge is expected to charge the jury in a manner that will enable it to measure the injured feelings attributable solely to the egregiousness of defendant's conduct.¹⁴⁴ Since the causal nexus is unclear, and the jury is asked to award actual damages for an injury to feelings, this task is difficult, if not impossible. Presumably, the actual damage award encompasses all of the hurt feelings the plaintiff sustained. A better approach would be to allow the jury to consider the ill will of defendant in evaluating plaintiff's actual damages, thereby avoiding an unnecessarily confusing jury instruction.

Various panels of the court of appeals continued to draw lines regarding the "public interest" qualified privilege. In *Rouch v. Enquirer & News*,¹⁴⁵ defendant published that plaintiff had been arrested for the rape and assault of a seventeen year-old woman. The article set forth the details of the alleged assault and falsely

139. 104 Mich. App. at 71, 304 N.W.2d at 819.

140. 421 Mich. at 142-43, 364 N.W.2d at 608-09.

141. *Id.* at 134, 364 N.W.2d at 605.

142. *Id.* (quoting *Wise v. Daniel*, 221 Mich. 229, 190 N.W.2d 746 (1922)).

143. In support of its holding, the court noted that the libel statute has been reenacted several times without substantial change. The court therefore inferred that the legislature approved of the judicial interpretation of the statutory language. 421 Mich. at 133, 364 N.W.2d at 604.

144. *Id.* at 135, 364 N.W.2d at 605.

145. 137 Mich. App. 39, 357 N.W.2d 794 (1984) (application for leave to appeal pending).

indicated that plaintiff had been charged with the offense.¹⁴⁶ The court of appeals held that the defamatory statements were not privileged, distinguishing matter that is interesting to the public from that which is in the "public interest."¹⁴⁷ The court characterized defendant's article as simply detailing "matters that the public would find generally interesting and not matters 'deserving of robust public debate.'"¹⁴⁸ The court also suggested that the press may avoid liability in negligence "by either reporting the fact of an individual's arrest, without mentioning the details of the crime . . . or by reporting the details of the alleged crime without naming the suspect until the matter has advanced to official proceedings (and so avoiding even the possibility that the article is libelous)."¹⁴⁹

A different court of appeals' panel appeared to reach a conflicting result in *Dienes v. Associated Newspapers, Inc.*¹⁵⁰ *Dienes* involved a television news report of an investigation that the Michigan State Police and Michigan Humane Society conducted about a starving herd of cows. Following an interview with plaintiff, the reporter stated that "[t]hese cows are now getting a little bit to eat but as you can see that has not always been the case."¹⁵¹ It was later determined that the herd was not malnourished, but had been diseased.¹⁵²

As in *Rouch*, the publication went beyond mere description of governmental conduct to contain statements that expressly or impliedly linked plaintiff to obviously odious conduct. The newscaster could have limited his comments to the facts of the investigation without linking plaintiff personally to the alleged wrongdoing. Nevertheless, the court affirmed the trial court's grant of summary judgment in favor of defendant, emphasizing that defendant had a reasonable basis for making the statements at the time of the report.¹⁵³

146. *Id.* at 42-43, 357 N.W.2d at 796-97.

147. *Id.* at 58-59, 357 N.W.2d at 804.

148. *Id.* at 58, 357 N.W.2d at 804 (quoting *Gaynes v. Allen*, 128 Mich. App. 42, 339 N.W.2d 678 (1983)). Similarly, in *Nabkey v. Booth Newspapers, Inc.*, 140 Mich. App. 507, 364 N.W.2d 363 (1985) (application for leave to appeal pending), a different panel of the court of appeals reversed the lower court's grant of summary judgment to defendant, stating that the details of plaintiff's arrest "merely provided interesting or amusing reading for the public." *Id.* at 513, 364 N.W.2d at 366.

149. 137 Mich. App. at 59, 357 N.W.2d at 804-05.

150. 137 Mich. App. 272, 358 N.W.2d 562, *leave to appeal denied*, 419 Mich. 962 (1984).

151. *Id.* at 275, 358 N.W.2d at 564.

152. *Id.* at 281, 358 N.W.2d at 566.

153. *Id.* at 286, 358 N.W.2d at 569.

IV. MEDICAL MALPRACTICE

Despite numerous appellate opinions in the medical malpractice area during the *Survey* period, few were significant. The only supreme court opinion established that the accrual provision for medical malpractice actions¹⁵⁴ applies to an action against a hospital for negligently provided medical services.¹⁵⁵

Two cases decided by the court of appeals are worthy of brief comment. In *Duvall v. Goldin*¹⁵⁶ the court of appeals analyzed the duty physicians owed to third parties. After an automobile accident with one of defendant's patients, plaintiff sued, alleging that defendant had a duty to properly diagnose and treat his patient's epileptic condition, which included preventing his patient from operating a motor vehicle.¹⁵⁷ The court of appeals agreed,¹⁵⁸ stating that injury to third parties was a foreseeable result of defendant's failure to prevent his patient from driving.¹⁵⁹ Although the court attempted to narrow its holding to the facts of the case,¹⁶⁰ the facts necessary to invoke the duty should prove commonplace. The decision merely requires proof of a medical condition which, when negligently treated, poses a foreseeable risk of injury to a third party. *Duvall* thus represents an important expansion of medical malpractice liability.

In *Lincoln v. Gupta*,¹⁶¹ the trial court suppressed evidence showing that defendant hospital negligently obtained decedent's informed consent prior to a heart catheterization. The trial court also charged the jury that *only* defendant physician had a duty to inform the patient of risks associated with the surgery.¹⁶² The court of appeals held that defendant hospital did not have a duty to obtain decedent's informed consent and imposed this duty solely on the physician.¹⁶³ The court reasoned that physicians are in the

154. MICH. COMP. LAWS ANN. § 600.5838 (West Supp. 1985).

155. The accrual provision is a part of the revised judiciary act and does not define, by its express terms, malpractice. The court noted that the statute "evidenced a legislative intent to alter the common law and subject other health professionals to potential liability for malpractice." *Adkins v. Annapolis Hosp.*, 420 Mich. 87, 95, 360 N.W.2d 150, 154 (1984).

156. 139 Mich. App. 342, 362 N.W.2d 275 (1984) (application for leave to appeal pending).

157. *Id.* at 345-46, 362 N.W.2d at 276.

158. *Id.* at 352, 362 N.W.2d at 279.

159. *Id.*

160. *Id.*

161. 139 Mich. App. 615, 370 N.W.2d 312 (1985).

162. *Id.* at 620-21, 370 N.W.2d at 315-16.

163. *Id.* at 625, 370 N.W.2d at 318.

best position to discuss these matters with patients and to obtain informed consent prior to treatment.¹⁶⁴

The court then rejected plaintiff's argument that the hospital undertook the duty to inform the decedent by supplying the informed consent form, concluding that since defendant physician signed the form, any breach of duty was attributable to him.¹⁶⁵ This approach begs the question. By relying on the physician's signature to exculpate the hospital, the court avoided answering the question of whether the hospital had a duty to obtain plaintiff's informed consent.

V. PREMISES LIABILITY

Several cases in the area of premises liability merit comment. In *Doran v. Combs*¹⁶⁶ plaintiff, defendant's former mother-in-law, fell and broke her ankle while in defendant's driveway. At the time of the accident, plaintiff was returning her grandchildren to their mother after the children's weekend visitation with their father. Plaintiff claimed that the trial judge should have instructed the jury that she was an invitee as a matter of law, rather than submitting the issue to the jury. The court of appeals agreed, holding that plaintiff's presence on the "premises was mutually beneficial and primarily a service to defendant, a service defendant impliedly invited as it saved her a 24-mile round trip and a possible altercation with her ex-husband."¹⁶⁷

In *Klimek v. Przewiecki*,¹⁶⁸ the court found that a loose dog was a "condition on the land" and held that the occupier of the land owed a duty of reasonable care to prevent injury to a four year-old licensee.¹⁶⁹ *Klimek* is the first Michigan case to impose this duty on a mere licensee.¹⁷⁰ The case is also significant because it reflects the modern trend of affording children enhanced protection by imposing a more onerous duty upon the occupiers of land.¹⁷¹

164. *Id.*

165. *Id.* at 626, 370 N.W.2d at 318.

166. 135 Mich. App. 492, 354 N.W.2d 804 (1984).

167. *Id.* at 497, 354 N.W.2d at 806.

168. 135 Mich. App. 115, 352 N.W.2d 361 (1984).

169. *Id.* at 119, 352 N.W.2d at 363.

170. See *Scheibel v. Hillis*, 531 S.W.2d 285 (Mo. 1976); *Paquette v. Joyce*, 117 N.H. 832 (1977); *Quinlan v. Cecchini*, 531 N.Y.2d 686 (1977); *Hudson v. Gestow*, 675 S.W.2d 699 (Tenn.1984).

171. The court stated in dictum that, "[t]hese authorities lead us to recognize a duty on occupiers of land owed to a child social guest to exercise reasonable or ordinary care to prevent injury to the child." 135 Mich. App. at 120, 352 N.W.2d at 364.

In another case of first impression, *Langen v. Rushton*,¹⁷² plaintiff motorcyclist collided with a vehicle exiting a parking area. A tree located within a median strip owned by the shopping mall obstructed the view of the roadway from the parking area. The court of appeals found that the owner of a shopping center owed a duty to motorists using highways adjacent to the shopping center parking area,¹⁷³ citing the *Restatement of Torts*.¹⁷⁴ It is unclear whether the court treated the tree and shopping center parking lot as an artificial condition, a natural condition, or an entity having characteristics of both.

Langen has increased significance when considered with the burdens that the no-fault threshold of severe impairment imposes upon plaintiffs. *Langden*, in a narrow segment of automobile accident cases, apparently provides an avenue for negligence actions that otherwise might not reach a jury.

The most novel case decided during the *Survey* period was *Sanford v. City of Detroit*.¹⁷⁵ In that case, plaintiff alleged that she was sexually assaulted in an abandoned building owned by

172. 138 Mich. App. 672, 360 N.W.2d 270 (1984).

173. *Id.* at 678, 360 N.W.2d at 273.

174. RESTATEMENT (SECOND) OF TORTS §§ 363, 364, 368 (1977) provides: § 363. Natural Conditions

(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.

(2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

§ 364. Creation of Maintenance of Dangerous Artificial Conditions

A possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm,

(a) the possessor has created the condition, or

(b) the condition is created by a third person with the possessor's consent or acquiescence while the land is in his possession, or

(c) the condition is created by a third person without the possessor's consent or acquiescence, but reasonable care is not taken to make the condition safe after the possessor knows or should know of it.

§ 368. Conditions Dangerous to Travelers on Adjacent Highway

A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who

(a) are traveling on the highway, or

(b) foreseeably deviate from it in the ordinary course of travel.

175. 143 Mich. App. 194, 371 N.W.2d 904.

defendant. The court of appeals held that plaintiff sufficiently plead a claim for intentional nuisance.¹⁷⁶ As the dissent indicated, this decision may result in an expansion of the common law duties currently imposed upon private landowners. Notably, the court did not characterize plaintiff's status as an invitee, licensee or trespasser. Although premised upon an intentional nuisance theory, *Sanford* may begin an evolution toward a general duty of reasonable care.¹⁷⁷

The dissent recognized the possible impact of the decision on the duties of owners and occupiers of land:

We should not inflate the nuisance exception to a previously inconceivable volume, nor should we overlook the effect this holding will have on the potential liability of private landowners. We should not forget that anything said in a decision in a "nuisance" case with a governmental defendant may, indeed will, be applied to non-governmental defendants as well. . . . [heretofore] the duty to prevent the harm [has hinged] upon the existence of a special relationship between the land owner and the plaintiff, such as a landlord/tenant or invitor/invitee relationship.¹⁷⁸

VI. DRAMSHOP

The Michigan Dramshop Act¹⁷⁹ (Act) provides an exclusive remedy against licensed retailers who serve or furnish liquor to visibly intoxicated persons.¹⁸⁰ The Act has been construed to provide recovery in tort in a very narrow class of cases.¹⁸¹ Further, non-innocent imbibers are precluded from availing themselves of the remedies afforded under the Act.¹⁸²

176. *Id.* at 200, 371 N.W.2d at 907.

177. The intentional nuisance theory is a judicially created doctrine that allows a plaintiff to overcome statutory governmental immunity. *See* Rosario v. Lansing, 403 Mich. 124, 131, 268 N.W.2d 230, 232 (1978).

178. 143 Mich. App. at 203, 371 N.W.2d at 908-09.

179. MICH. COMP. LAWS ANN. § 436.22 (West 1978 & Supp. 1985).

180. *Moran v. McNew*, 134 Mich. App. 764, 351 N.W.2d 881, *leave to appeal denied*, 418 Mich. 905, 324 N.W.2d 521 (1984) (Dramshop Act provides the exclusive remedy against sellers of alcohol for injuries caused by a minor or intoxicated person who was unlawfully provided with alcohol).

181. *See* *Manuel v. Weitzman*, 386 Mich. 157, 191 N.W.2d 474 (1971); *Morris v. Markley*, 143 Mich. App. 12, *leave to appeal denied*, 421 Mich. 864 (1985).

182. *See* *McDaniel v. Crapo*, 326 Mich. 555, 40 N.W.2d 724 (1950); *Malone v. Lambrecht*, 305 Mich. 58, 8 N.W.2d 910 (1943); *Gregory v. Curtis*, 108 Mich. App. 443, 310 N.W.2d 415 (1981).

In light of increased public attention and lobbying efforts directed to the Act, recent court of appeals decisions appear to have expanded the exposure of dramshop defendants. For example, the court of appeals has held that a dramshop may be sued in tort under certain circumstances¹⁸³ and that dramshops may be liable to the parents of a minor, even though the minor did not directly purchase intoxicants from defendant.¹⁸⁴ In addition, *Putney v. Haskins*¹⁸⁵ continues to provide tension, for several courts have found exceptions to the requirement that the noninnocent imbiber be "named and retained"¹⁸⁶ as a party defendant.¹⁸⁷

The most significant case decided by the court of appeals during the *Survey* period was *Morris v. Markley*.¹⁸⁸ The court determined that a dramshop defendant could be sued on the basis of gross negligence when defendant had actual notice of plaintiff's helpless condition.¹⁸⁹ In that case, the dramshop knew that plaintiff was an alcoholic, yet deliberately served her intoxicating beverages to enhance her performance as an exotic dancer. Plaintiff was subsequently injured in an automobile accident.

The court acknowledged a split of authority regarding a claim for gross negligence and willful and wanton misconduct against a dramshop defendant, but found that plaintiff could sue in tort.¹⁹⁰ In finding a basis for tort liability, the court relied on *Grasser v. Fleming*¹⁹¹ for the proposition that there are certain circumstances that provide an exception to the Act's exclusivity.¹⁹² In *Morris*, defendant's reckless disregard of plaintiff's welfare was a sufficient circumstance.

This exception to the general prohibition of the Dramshop Act is apparently limited to cases in which the facts establish "both gross negligence and actual notice of plaintiff's condition that

183. See *infra* note 187 and accompanying text.

184. See *infra* notes 203-05 and accompanying text.

185. 414 Mich. 181, 324 N.W.2d 729 (1982).

186. MICH. COMP. LAWS ANN. § 436.22(5) (West 1978 & Supp. 1985).

187. *Putney* is based upon the failure to "name and retain." Despite substantial settlement with the intoxicated defendant, the injured party can bring no action against the dramshop if the intoxicated person is no longer a party to the suit. 414 Mich. at 184, 324 N.W.2d at 729.

188. 143 Mich. App. 12, 371 N.W.2d 464 (1985).

189. *Id.* at 15, 371 N.W.2d at 466. *Morris* reversed a summary judgment for the plaintiff. *Id.*

190. *Id.*

191. 74 Mich. App. 338, 253 N.W.2d 757 (1977).

192. *Morris* cites *Grasser* for the exception to the exclusivity of the Dramshop Act when defendant's culpability is unrelated to the sale of alcohol. *Grasser* involved liability for the negligent maintenance of business premises. 74 Mich. App. at 345-46, 253 N.W.2d at 760-61.

would make the serving of alcohol willful, wanton and intentional and a reckless disregard of plaintiff's helpless condition"¹⁹³ Thus, *Morris* expands the tort liability of dramshop defendants.¹⁹⁴

The aftermath of *Putney* continues to be problematic. *Putney* established that the intoxicated person must be named and retained as party to the dramshop action until the litigation is concluded.¹⁹⁵ Thus, even where defendant imbibers settle within the insurance policy limits, *Putney* requires their retention. The basis for this requirement is the avoidance of collusion between imbibers and plaintiffs. Ironically, *Putney* has fostered this type of collusion. The insurance carrier for a culpable imbibor typically attempts to limit exposure to the policy limits or below by providing at minimum a very cooperative witness or becoming a partner at trial.

Several recent opinions have dispensed with or lessened the impact of the name and retain requirement. In *Brannstrom v. Tippman*,¹⁹⁶ the court of appeals held that retention of the imbibing defendant driver in a separate wrongful death action was sufficient to satisfy the requirement.¹⁹⁷ In *Newman v. Hoholhick*,¹⁹⁸ the court of appeals found that the requirement was satisfied when the imbibor was the father of the plaintiff.¹⁹⁹ Relying on *Salas v. Clements*,²⁰⁰ the court reasoned that requiring retention of the plaintiff's father would be unreasonable and inconsistent with the purpose of the "name and retain" provision.²⁰¹ According to the court, *Putney* need not be strictly adhered to because *Putney* did not expressly or impliedly overrule cases that create exceptions to the "name and retain" requirement.²⁰²

Brannstrom and *Newman* demonstrate the lack of strict adherence to *Putney*. In *Newman* for example, strict adherence to *Putney* would have extinguished the dramshop claim since defendant driver could not have been retained in the suit because of

193. 143 Mich. App. at 15, 371 N.W.2d at 466.

194. See *Manuel*, 386 Mich. 157, 191 N.W.2d 474. Prior to *Morris*, failure to maintain safe premises was the only negligence claim available against a dramshop defendant.

195. See *supra* note 184.

196. 141 Mich. App. 664, 367 N.W.2d 902, leave to appeal denied, 422 Mich. 976 (1985).

197. *Id.* at 672, 367 N.W.2d at 906.

198. 138 Mich. App. 66, 359 N.W.2d 253 (1984).

199. *Id.* at 72, 359 N.W.2d at 256.

200. 399 Mich. 103, 247 N.W.2d 889 (1984). *Salas* held that it was necessary to "name and retain" the intoxicated defendant who had assaulted plaintiff where plaintiff did not know defendant's identity. *Id.* at 110, 247 N.W.2d at 892.

201. 138 Mich. App. at 70, 359 N.W.2d at 255 (quoting *Salas*, 399 Mich. at 109, 247 N.W.2d at 889).

202. 138 Mich. App. at 70, 359 N.W.2d at 255-56.

family immunity. It is doubtful that the legislature intended that a culpable dramshop avoid liability on the basis of the noninnocent imbiber's familial connection to the injured plaintiffs.

In *Verdusco v. Miller*,²⁰³ the court of appeals affirmed an award of damages to the parents of a minor who had consumed alcoholic beverages purchased from defendant. The distinguishing factor in *Verdusco* was that plaintiff's son did not purchase the beverages directly from defendant. Dramshop defendant sold intoxicants to another minor who provided the beverage to plaintiff's son. The trial court found that the dramshop defendant knew or should have known that the liquor would eventually reach other minors. Thus, it denied defendant's motion for summary judgment. The court of appeals affirmed the result.²⁰⁴

Since the statutory language speaks only to direct sales to minors,²⁰⁵ *Verdusco* provides a judicial gloss extending beyond the express terms of the statute. Nevertheless, depending upon the specific facts in support of the agency theory, such expansion is well-premised. It would be anomalous to allow a dramshop defendant to assert lack of a sale to a minor as a complete defense when it knew of the agency relationship.

In contrast to those pronouncements expanding dramshop liability, several recent decisions provide some limitations. In *Klotz v. Persenaire*,²⁰⁶ the court held that the parents of an intoxicated minor could not maintain an action for wrongful death against a social host who provided alcohol to the minor. The minor drowned in a boating accident involving defendant's boat. The court of appeals held that the legislative policy implicit in the Act, which favors precluding suit by noninnocent imbibers, also applied to actions against social hosts. Therefore, since the minor would be unable to recover had he survived, his parents were also precluded from recovering against the host.²⁰⁷

Klotz is analytically faulty and unjust. The purpose of the Act is to create a cause of action for innocent third parties; such actions are regularly maintained. *Klotz* imposes the burden of the dramshop bar without the benefits of the Dramshop Act. Under

203. 138 Mich. App. 702, 360 N.W.2d 281 (1984), *leave to appeal denied*, 424 Mich. 863 (1985).

204. The *Verdusco* court relied on language in *Meyer v. State Line Super Market*, 1 Mich. App. 562, 569, 137 N.W.2d 299, 302 (1965) (agency relationship between a minor who buys alcohol and his friends could be known to a defendant).

205. MICH. COMP. LAWS ANN. § 436.22(3) (West 1978 & Supp. 1985).

206. 138 Mich. App. 638, 360 N.W.2d 255 (1984) (application for leave to appeal pending).

207. *Id.* at 641-42, 360 N.W.2d at 287.

Klotz, parents of the noninnocent imbibor can sue when a social host violates prohibitions against liquor sales to minors resulting in personal injury. However, parents are barred when the violation results in the death of the minor. The court's preclusion of plaintiffs' claim directly contradicts a prior court of appeals' decision²⁰⁸ and arguably fails to properly construe the statutory prohibition against sales of alcohol to minors in accordance with its underlying legislative intent. This prohibition is intended to embody and extend common law traditions of protecting minors. The preclusion of a civil action for violation of this prohibition conflicts with its underlying legislative intent because it punishes minors and protects the individuals who corrupt them.

Klotz effectively destroys any cause of action for minors or their families when injuries not resulting in death occur as a result of the unlawful serving of alcohol to a minor by a social host. This result was tempered because the court allowed plaintiff to proceed on the theory that defendant negligently permitted plaintiffs' decedent to operate a powerboat while intoxicated. That portion of the court's holding, however, does not mitigate the impact of the decision on future cases involving a violation of liquor sales laws. Moreover, *Klotz* conflicts with both Michigan precedent and precedent from other jurisdictions.²⁰⁹

*Lyman v. Bavar*²¹⁰ applied comparative negligence to a dram-shop action, precluding recovery where plaintiff's negligence was unrelated to the prohibited acts associated with the sale and purchase of intoxicants. *Dahn v. Sheets*,²¹¹ however, appears to provide an analysis contrary to *Lyman*. In *Dahn*, the court reasoned that comparative negligence only applied to claims based on negligence.²¹² This approach to the comparative negligence issue would preclude the result reached in *Lyman*.

208. *Longstreth v. Fitzgibbon*, 125 Mich. App. 261, 375 N.W.2d 677 (1982), *leave to appeal granted*, 418 Mich. 876 (1983).

209. Other jurisdictions have held social hosts subject to liability when serving liquor to minors or visibly intoxicated persons. *See Ashlock v. Norris*, 475 N.E.2d 1167 (Ind. App. 1985); *Sutter v. Hutchings*, 254 Ga. 194, 327 S.E.2d 716 (1985); *Kelly v. Gwinell*, 96 N.J. 538, 476 A.2d 1219 (1984); *Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515 (1983).

210. 136 Mich. App. 407, 356 N.W.2d 28 (1984).

211. 104 Mich. App. 584, 305 N.W.2d 547 (1981). *Lyman* distinguished *Dahn* on the grounds that it involved a plaintiff who was not subject to an offset for his negligence in being personally intoxicated. In *Lyman*, the court noted that plaintiff was injured by his own negligence that was not related to the intoxication of those who injured him during a fight at the bar. 136 Mich. App. at 410, 356 N.W.2d at 30.

212. 104 Mich. App. at 593, 305 N.W.2d at 551.

VII. NO-FAULT

The Michigan No-Fault Act²¹³ supplanted traditional tort remedies for automobile accidents by providing a statutory benefit scheme. Under the statute, an injured person may recover specified benefits regardless of the cause of the accident. Civil damages may be recovered where a person sustains severe personal injuries.²¹⁴

In *Cassidy v. McGovern*,²¹⁵ the supreme court sought to provide uniform interpretation in serious impairment cases. Nevertheless, various panels of the court of appeals continue to wrestle with this threshold requirement for recovery in tort. Exemplary of this confusion is *Argenta v. Shahan*.²¹⁶ That court stated that reference to alternative thresholds of tort liability—death and permanent serious disfigurement—are irrelevant and a source of confusion.²¹⁷ The court held that objective thermographic test results, demonstrating muscle tears and scar tissue and the resultant limitation of plaintiff's ability to move his back, satisfied the severe impairment threshold as a matter of law.²¹⁸ Therefore, the court of appeals affirmed the denial of defendant's motion for directed verdict, even though plaintiff was not hospitalized overnight and continued to work.²¹⁹

In contrast, the court of appeals found no serious impairment of bodily function in *Vreeland v. Wayman*,²²⁰ and *Flemings v. Jenkins*.²²¹ These cases involved soft tissue injuries. *Vreeland* held

213. MICH. COMP. LAWS ANN. §§ 500.3101-3179 (West 1983).

214. The statute provides that "[a] person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." *Id.* § 500.3135(1).

215. 415 Mich. 483, 330 N.W.2d 22 (1982). The *Cassidy* court composed guidelines for the determination of serious impairment of bodily function:

1) The term serious impairment must be considered in conjunction with the other two threshold requirements, death and permanent serious disfigurement.

2) The impairment must be of important body functions.

3) The court will look to a person's general ability to lead a normal life and not to that person's specific lifestyle to determine serious impairment.

4) The injuries must be objectively manifested.

5) While permanency is relevant, it is not conclusive.

Id. at 503-05, 330 N.W.2d at 30.

216. 135 Mich. App. 477, 354 N.W.2d 796, *leave to appeal granted*, 421 Mich. 858 (1985).

217. *Id.* at 482, 354 N.W.2d at 799.

218. *Id.* at 486-89, 354 N.W.2d at 801-02.

219. *Id.* at 489, 354 N.W.2d at 802.

220. 141 Mich. App. 574, 367 N.W.2d 362 (1985).

221. 138 Mich. App. 788, 360 N.W.2d 298 (1984).

that the threshold of serious impairment had not been satisfied because the injuries were not subject to medical measurement and permitted plaintiff to continue to lead a normal life.²²² Similarly, *Flemings* found that lumbar pain and limited back flexion did not constitute serious impairment.²²³ *Flemings* involved some objective manifestation of injury, namely the testimony of a treating physician as to plaintiff's back spasms. Despite such evidence and a therapy treatment that extended for more than one year, the court held that serious impairment had not occurred because no objectively manifested injury existed and plaintiff's lifestyle did not change much.²²⁴

Argenta, *Vreeland*, and *Flemings* illustrate the conflict in the court of appeals over soft tissue injuries.²²⁵ The cases can be reconciled on the basis that *Argenta* included "objective" medical test results. Unfortunately, that explanation is inadequate since the injuries in *Flemings* were objectively manifested by back spasms.²²⁶ Moreover, *Cassidy* merely required some objective manifestation of injury.²²⁷ Should the court of appeals continue to follow the *Flemings*' treatment of "objective manifestation," absent the admissibility of the thermographic test results, recovery in soft tissue injury cases will be difficult.²²⁸

Another split of authority in serious impairment cases involves recovery for loss of earning capacity.²²⁹ In *MacDonald v. State*

222. 141 Mich. App. at 576-77, 367 N.W.2d at 363.

223. 138 Mich. App. at 790, 360 N.W.2d at 299.

224. *Id.*

225. Michigan Court of Appeals cases have shown varying degrees of injuries sufficient to constitute severe impairment. See *Range v. Gorosh*, 140 Mich. App. 712, 364 N.W.2d 686 (1985) (six broken ribs, a broken clavicle, a broken toe, continued difficulty in breathing, and a four day hospital stay met the threshold of serious bodily impairment); *Sherrell v. Bugaski*, 140 Mich. App. 708, 364 N.W.2d 684 (1985) (permanent back injury that prohibited plaintiff from setting for long periods or from jogging was not a serious impairment when plaintiff could otherwise lead a normal life); *Burke v. Warren*, 137 Mich. App. 715, 359 N.W.2d 541 (1984) (fractured clavicle resulting in temporary immobility of one arm was not a serious impairment of a bodily function), *leave to appeal granted*, 422 Mich. 935 (1985).

226. 138 Mich. App. at 789, 360 N.W.2d at 299.

227. 415 Mich. at 505, 330 N.W.2d at 30.

228. Michigan, unlike other jurisdictions with a specific statute, leaves the determination of serious bodily impairment as a factual one. For a survey of statutes in other jurisdictions, see Obee, *Torts*, 1983 *Ann. Survey of Mich. Law*, 30 WAYNE L. REV. 803, 834-36 nn.160-61 (1984).

229. MICH. COMP. LAWS ANN. § 500.3135(2)(c) (West 1983) provides for recovery of "[d]amages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110" Section 3107(b) states that "[p]ersonal protection benefits are payable for . . . work loss consisting of loss of income

Farm Mutual Insurance Co.,²³⁰ the supreme court denied "work loss" benefits to a plaintiff who suffered a heart attack two weeks after the accident giving rise to his no-fault claim.²³¹ The court held that plaintiff could not recover because he would not have earned wages during the two week period even if the accident had not occurred.²³² This result precludes consideration of lost earning capacity because the magnitude of plaintiff's lost earning capacity sustained at the time of the accident would have been the measure of the benefits payable to him.

The court in *Ouellette v. Kenealy*,²³³ relying on *MacDonald*, held that damages for work loss under the tort liability section are defined by the sections covering work loss and that work loss within those sections excludes loss of earning capacity.²³⁴ Therefore, the court concluded that the tort liability section excludes loss of earning capacity.²³⁵ *Ouellette* expressly rejected the contrary reasoning in *Argenta* in reaching this conclusion. After discussing serious impairment of bodily function, the *Argenta* court held that a plaintiff could bring a tort action for loss of earning capacity.²³⁶ The *Ouellette* court concluded that the statutory language governing the payment of personal protection benefits limited tort recovery.²³⁷

The split between *Argenta* and *Ouellette* is based on the express language of section 3135, which arguably incorporates the definition of work loss found in section 3107(b). This issue is further complicated by supreme court statements in *Cassidy* indicating that economic loss greater than the statutory scheme was recoverable by means of a tort action.²³⁸ *Cassidy* reasoned that the purpose of the No-Fault Act was to provide the catastrophically injured victim and the victim of extraordinary economic losses with compensation beyond that provided in the No-Fault Act.²³⁹

Michigan courts also decided two cases concerning recovery

from work an injured person would have performed during the first 3 years after the date of the accident if he had not been injured" *Id.* § 500.3107(b).

230. 419 Mich. 146, 350 N.W.2d 233 (1984).

231. *Id.* at 154, 350 N.W.2d at 236.

232. *Id.* at 151-52, 350 N.W.2d at 235-36.

233. 141 Mich. App. 562, 367 N.W.2d 353 (1985).

234. *Id.* at 564, 367 N.W.2d at 355.

235. *Id.*

236. 135 Mich. App. at 485, 354 N.W.2d at 801.

237. *Id.* at 564, 367 N.W.2d at 355. The *Ouellette* court cited *MacDonald*.

MacDonald was not a serious impairment case, however.

238. The court in *Cassidy* stated that "for economic losses beyond those for which payment was assured, the traditional tort remedy was left intact." 415 Mich. at 499, 330 N.W.2d at 28.

239. *Id.*

by garage owners under the no-fault system. In *Michigan Mutual Insurance Co. v. Carson City Texaco, Inc.*,²⁴⁰ plaintiffs's garage was damaged when defendant's truck exploded while plaintiff was serving it. The supreme court required the vehicle owner's insurance carrier to pay for the damages, despite the possibility of contributory negligence.²⁴¹ Chief Justice Williams concurred, stating that statutory construction compelled this result, even if it was against public policy.²⁴²

In *Coleman v. Franzone*,²⁴³ plaintiff was injured as a result of defendant's negligent repairs on her vehicle. Relying on *Citizens Insurance Co. v. Tuttle*,²⁴⁴ the court of appeals held that the no-fault scheme only applied to accidents caused by motor vehicles. Thus, nonmotorist tortfeasors remain liable in tort.²⁴⁵

VIII. INTENTIONAL TORTS

Significant developments in the area of intentional torts concern battery and intentional interference with business relations. In *Overall v. Kadella*,²⁴⁶ the court of appeals affirmed a verdict for plaintiff hockey player who was injured in a melee immediately following a hockey game. The court reasoned that plaintiff's consent to physical contact during the game did not extend to contact after the game.²⁴⁷ The court also reasoned that the conduct complained of constituted a violation of the safety rules of the game.²⁴⁸ This result is consistent with decisions from other jurisdictions.²⁴⁹

240. 421 Mich. 144, 365 N.W.2d 89 (1984).

241. *Id.* at 149, 365 N.W.2d at 91.

242. *Id.* at 149, 365 N.W.2d at 92.

243. 141 Mich. App. 99, 366 N.W.2d 86 (1985).

244. 411 Mich. 536, 309 N.W.2d 174 (1981).

245. 141 Mich. App. at 102, 366 N.W.2d at 87.

246. 138 Mich. App. 342, 361 N.W.2d 352 (1984).

247. *Id.* at 358, 361 N.W.2d at 356.

248. *Id.* at 357-58, 361 N.W.2d at 355 (citing RESTATEMENT (SECOND) OF TORTS § 50 comment b (1965)) (participation in a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants of the game and not merely to secure the better playing of the game as a test of skill).

249. See *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975) (teenage member of soccer team kicked goalie in head while goalie had possession of ball in penalty area where contact with goalie is prohibited); *Griggas v. Clauson*, 6 Ill. App. 2d 412, 128 N.E.2d 363 (1955) (defendant intentionally struck plaintiff during a basketball game without provocation); *Bourque v. DuPlechin*, 331 So. 2d 40 (La. App.) (defendant ran out of the base path in a softball game and intentionally collided with the second baseman), *cert. denied*, 334 So. 2d 210 (La. 1976).

The court of appeals continues to grapple with the issue of intentional interference with business relations. In *Trepel v. Pontiac Osteopathic Hospital*,²⁵⁰ the court of appeals affirmed the judgment in favor of plaintiffs, but found that the trial court incorrectly stated the elements of intentional interference with business relations.²⁵¹ The trial court cited *Northern Plumbing & Heating, Inc. v. Henderson Bros. Inc.*²⁵² and its progeny²⁵³ as authority for the four basic elements of tortious interference with business relations. These elements include the presence of a valid business relationship or expectancy, knowledge of the business relationship or expectancy by the interferer, an intentional interference that induces or causes a breach or termination of the business relationship or expectancy, and the resulting damage to the party whose business relationship or expectancy is disrupted.²⁵⁴

The court of appeals, however, cited authorities that require a showing of improper conduct to establish intentional interference with business relations.²⁵⁵ The *Trepel* court and the court of appeals in *Feldman v. Green*²⁵⁶ required that the *Meyering* definition of intentional interference with business relations be employed.²⁵⁷ If *Trepel* is followed, intentional interference with business relations and intentional interference with contractual relations will be nearly identical, despite the *Trepel* court's statement that the definition

250. 135 Mich. App. 361, 354 N.W.2d 341 (1984).

251. *Id.* at 375-76, 354 N.W.2d at 347.

252. 83 Mich. App. 84, 268 N.W.2d 296 (1978).

253. *See, e.g., Derosia v. Austin*, 115 Mich. App. 647, 321 N.W.2d 760 (1982); *Wilkerson v. Carlo*, 101 Mich. App. 629, 300 N.W.2d 658 (1980).

254. *See supra* notes 245-46.

255. 135 Mich. App. at 377, 354 N.W.2d at 347. The court cited *Meyering v. Russell*, 53 Mich. App. 695, 220 N.W.2d 121 (adopting the concurrence of O'Hara, J.), *rev'd on other grounds*, 393 Mich. 770 (1974). *See also, Weitting v. McFetters*, 104 Mich. App. 188, 197, 304 N.W.2d 525, 529 (1981).

The court also cited the RESTATEMENT (SECOND) OF TORTS § 766B (1979) which states:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of:

a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

b) preventing the other from acquiring or continuing the prospective relation.

256. 138 Mich. App. 360, 377, 360 N.W.2d 881, 890 (1984). *Feldman* involved the same issues as *Trepel*. After a lengthy discussion of Michigan case law, the *Feldman* court failed to recognize the conflict. For that reason, *Trepel* is used to illustrate the issue. *Feldman* also implied that an option contract was not sufficient to plead intentional interference with contractual relations.

257. 135 Mich. App. at 377, 354 N.W.2d at 347.

of improper may differ in degree when an actual contract is involved.²⁵⁸

Two court of appeals decisions, both involving insurance contracts, precluded the recovery of damages for emotional distress.²⁵⁹ The decisions in these cases are not surprising since the supreme court in *Kewin v. Massachusetts Mutual Life Insurance Co.*²⁶⁰ precluded recovery for emotional distress in breach of insurance contract cases and has recently reiterated this holding.²⁶¹ Although *Kewin* allowed some recovery for emotional distress in contract cases where the contracts were "matters of personality,"²⁶² neither *Harris* nor *Hajciar* fit this exception.

However, in *Roberts v. Auto-Owners Insurance Co.*²⁶³ the court of appeals affirmed a jury verdict for plaintiff based on intentional infliction of emotional distress. The court found that the insurer's failure to supply forms, as well as the severe nature of plaintiff's injuries and defendant's efforts "to frustrate plaintiffs from applying for benefits and then punishing them by failing to cooperate when they obtained counsel, could reasonably be considered extreme and outrageous."²⁶⁴

Roberts was the only case during the *Survey* period in which the court of appeals found defendant's conduct extreme and outrageous. In *Hall v. Citizens Insurance Co.*,²⁶⁵ the court found that the commencement of a subrogation lawsuit and the garnishment of a paycheck in a case of mistaken identity was not sufficiently

258. "The social desirability of encouraging competition will justify some actions in an advantageous business relationship case which would be tortious if a contract existed." *Id.* at 375, 354 N.W.2d at 346-47 (quoting *Northern Plumbing & Heating v. Henderson Bros., Inc.*, 83 Mich. App. 84, 100, 268 N.W.2d 296, 302 (1978)).

259. *Hajciar v. Crawford & Co.*, 142 Mich. App. 632, 369 N.W.2d 860 (1985) (trial court's grant of summary judgment for defendant affirmed although the decedent's death allegedly occurred as a result of depression and despondency caused by defendant/insurer's termination of workers' compensation benefits without cause); *Harris v. Citizen's Ins. Co.*, 141 Mich. App. 110, 366 N.W.2d 11 (1983) (claims representative's attempt to deceive plaintiff into admitting that he had gainful employment during the period for which he claimed disability was not actionable).

260. 409 Mich. 401, 295 N.W.2d 50 (1980).

261. See *Valentine v. General Am. Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984).

262. 409 Mich. at 416, 295 N.W.2d at 53.

263. 135 Mich. App. 595, 354 N.W.2d 271 (1983). This case was not discussed in last year's *Survey*.

264. *Id.* at 600, 354 N.W.2d at 273. The tort of intentional infliction of emotional distress requires that plaintiff show that defendant's conduct was extreme and outrageous. See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

265. 141 Mich. App. 676, 368 N.W.2d 250 (1985).

outrageous to warrant recovery for intentional infliction of emotional distress.²⁶⁶ The court apparently believed that being wrongfully subjected to a law suit and the consequent embarrassment and humiliation associated with garnishment was ordinary.

IX. COMPARATIVE NEGLIGENCE

In *Sweetman v. State Highway Department*,²⁶⁷ the court of appeals discussed the relationship of comparative negligence to the "rescue doctrine," holding that the rescue doctrine allowed a defendant to assert comparative negligence of the rescuer as a defense. Plaintiff witnessed a motor vehicle accident, apparently caused by slippery road conditions on a freeway overpass. The victim's vehicle slid into a guardrail, prompting plaintiff to stop her vehicle to render aid. After determining that the victim was not seriously injured, plaintiff positioned herself near the roadway and attempted to warn approaching traffic. A moving vehicle struck plaintiff, resulting in the traumatic amputation of one leg and the surgical amputation of the other. The trial court found that the highway department failed to adequately warn of the potential hazard. Nevertheless, plaintiff's verdict was reduced by an amount equivalent to the trial court's finding of seventy-five percent comparative negligence.²⁶⁸ The trial court found that plaintiff had been injured while acting beyond the scope of her rescue mission.²⁶⁹ The court of appeals disagreed on the comparative negligence issue. That court held that because plaintiff was engaged in the course of the rescue and acted under the reasonable belief that the victim's peril continued, her contributory negligence, if any, had to be reassessed.²⁷⁰

The court of appeals' exclusive focus upon the peril of the individual victim is troublesome. Plaintiff's attempt to warn other motor vehicle drivers could be construed as an attempt to rescue them from danger. Consideration of plaintiff's reasonable belief as to peril posed by the hazardous road conditions should be extended beyond the individual who has already sustained an accident and injury. To hold otherwise may place undue emphasis upon acts done subsequent to injury and minimize rescue acts to prevent further accidents and injuries.

266. *Id.* at 684, 368 N.W.2d at 254.

267. 137 Mich. App. 14, 355 N.W.2d 783 (1984).

268. *Id.* at 18-20, 355 N.W.2d at 786.

269. *Id.* at 27, 355 N.W.2d at 789.

270. *Id.* at 28, 355 N.W.2d at 790.